FOR ARGUMENT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-711

Southeastern Community College,

Petitioner,

v.

Frances B. Davis,

Respondent.

On *writ of Certiorari* to the United States Court of Appeals for the Fourth Circuit

Brief of the Center for Independent Living, and others as *amici curiae* in support of respondents

Of Counsel:

ANN FAGAN GINGER
1715 Francisco St.
Berkeley, CA 94703
(415) 848-0599

ROBERT J. FUNK

SUSAN B. SCHAPIRO

PAUL A. SILVER
Disability Law Resource Center
Center for Independent Living
2539 Telegraph Ave.
Berkeley, CA 94704
(415) 548-4274

Attorneys for Amici Curiae

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Berkeley, CA • **HELIOGRAPHICS** • (415) 548-8492

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Brief of the Disability Law Resource Center of the Center for Independent Living, Inc.;James Donald, Deputy Director, Legal Affairs Division, on behalf of the California State Department of Rehabilitation; Center for Independent Living, Inc.; Center for Living Independently in Pasadena; Bay Area Center for Law and the Deaf; and Deaf Self-Help, Inc. as amici curiae in support of respondent.

INTEREST OF THE AMICI CURIAE

The following groups, entities and individuals, as AMICI CURIAE, respectively submit this brief to the Court in support of the Respondent. (Copies of letters from the parties consenting to the Amici filing this brief have been filed with the Clerk of the Court).

·Disability Law Resource Center of the Center for Independent Living, Inc. (CIL/DLRC):

CIL/DLRC is a legal support and technical assistance center for the community based independent living/disability rights movement. The staff, including attorneys, paralegals and community organizers, provide legal assistance, back-up, education and training in disability rights and disability awareness. The goal is to ensure disabled people have the equal opportunity to full participation in society.

·James Donald, Deputy Director, Legal Affairs, on behalf of the California State Department of Rehabilitation (DR):

DR is the state agency designated in California to provide vocational and related rehabilitation services. A major objective is to train/retrain disabled people and enable them to move from a government benefit system to a position as a contributing member of society.

·Center for Independent Living, Inc. (CIL):
·Center for Living Independently in Pasadena (CLIP):

CIL and CLIP are non-residential community based independent living projects (ILP's) situated in the State of California. The ILP's are support centers run by and for disabled people. These projects provide, among others, services such as peer counseling, financial counseling, wheelchair repair, mobility training for blind persons and interpreters and services for the deaf, to a broad range of disabled people in their respective communities. The goal of the ILP's and their services is to assist disabled people to live independent lives; that is, lives outside of institutions.

The ILP's operate from a philosphical belief that all people, regardless of their physical or mental attributes, have the

right to participate in society to the full extent of their abilities and desires.

·Bay Area Center on Law and the Deaf (BACLAD):

BACLAD provides legal assistance to deaf people in the San Francisco Bay Area. A major focus is also impact work to ensure equal opportunity to deaf people who wish to participate in society.

·Deaf Self-Help, Inc. (DSH):

DSH is an employment counseling, placement and referral project that provides assistance to deaf persons. Their goal is to assist deaf persons in entering and remaining in the job market and achieving their full potential.

QUESTION PRESENTED

Whether a civil rights statute that prohibits discrimination on the basis of handicap can provide meaningful equal opportunity if the statute is not interpreted to impose an affirmative duty to make accommodations for persons with disabilities.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973 was enacted by Congress to put an end to long-standing discrimination against disabled persons by recipients of federal financial assistance. A long history of discrimination against the disabled has lead to a society that was designed without considering the needs of disabled persons. Disabled persons are segregated away from the mainstream of society by attitudinal, architectural, and communications barriers. Therefore, any statute that purports to ban discrimination against the disabled must be interpreted to require special accommodation to the needs of disabled persons, or the statute will be meaningless.

The HEW regulations implementing Section 504 correctly interpreted the statute as requiring institutions of post-secondary education to make special accommodations to the needs of disabled students.

I. A CIVIL RIGHTS LAW THAT PROHIBITS DISCRIMINATION ON THE BASIS OF HANDICAP MUST IMPOSE AN AFFIRMATIVE OBLIGATION TO TAKE POSITIVE ACTION TO ACCOMMODATE TO THE VERY HANDICAPS THE LAW PROHIBITS DISCRIMINATION AGAINST IF THE LAW IS TO PROVIDE ANY MEANINGFUL EQUALITY OF OPPORTUNITY FOR DISABLED PEOPLE.

A. SECTION 504 OF THE REHABILITATION ACT OF 1973 WAS ENACTED TO END CENTURIES OF DISCRIMINATION AGAINST AND SEGREGATION OF MILLIONS OF DISABLED PERSONS.

1. MISCONCEPTIONS, FEARS AND STEREOTYPES PERPETUATED BY SOCIETY HAVE RESULTED IN CENTURIES OF DISCRIMINATION AGAINST AND SEGREGATION OF DISABLED PEOPLE.

> "Psychologically, socially, and legally, the disabled throughout history have enjoyed among themselves a peculiar 'equality'; they have been equally mistrusted, equally misunderstood, equally mistreated, and equally impoverished."[1]

Throughout history, disabled persons have been viewed with a mix of fear and pity. They were feared because of the belief that an ill or "defective" person was a sinner--an evil social deviant marked for punishment.[2] The Bible, for example, listed twelve "blemishes" that prevented a priest from officiating, including "a blind man, or a lame, or a man that is brokenfooted, or be scurvy". The Old Testament commented that "The blind and the lame shall not come into my house."[3]

1. tenBroek and Matson, "The Disabled and the Law of Welfare", 54 Cal. L. R. 809, 814 (1966) (hereinafter cited as tenBroek & Matson).

2. See Wright, "Physical Disability - A Psychological Approach", 259 (Murphy ed. 1960) (hereinafter cited as Wright).

Under Greek law defective children were put to death,[4] and Plato's Commentaries concluded that, in the ideal society,

> "(T)he offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."[5]

People who are disabled have traditionally been the object of pity--they have been viewed as individuals who are incapable, unwilling and not expected to participate in or contribute to society. Thus, a societal attitude developed that a class of individuals, viewed as defective or different, required special institutions to ensure "proper" care and attention. As late as 1961 this attitude was graphically displayed in a

3. Ibid., 259.

4. A. Deutsch, "The Mentally Ill in America" 334 (1949).

5. Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

quote from a high school civics text:

> "The blind, the deaf, the dumb, the crippled, and the insane and feebleminded are sometimes known collectively as the defective--people who are lacking some normal faculty or power. Such people often need to be placed in some special institution in order to receive proper attention."[6]

These prejudicial attitudes, based on fear and pity, have resulted in the creation of discriminatory laws and practices designed to deny disabled people access to the social mainstream. This discrimination affects all classes of disabled persons[7] in virtually every aspect of their lives. As recently as the 1950's, 28 states had sterilization statutes for disabled people, and 17 specifically included persons with epilepsy.[8] This history includes statutes denying disabled people the right to marry,[9] to vote,[10] to obtain a driver's license,[11] or hold public office.[12] As late as 1974, "ugly" laws prohibited

6. tenBroek and Matson at 811, fn. 8 citing McCrocklin, "Building Citizenship" 244 (1961).

7. It is recognized that society tends to overclassify disabled people - "to emphasize common denominators among disadvantaged groups at the expense of differences between them" (tenBroek and Matson at 812). "Thus, the disabled, like all other minority groups - tend to be evaluated more on the basis of their categorical membership than on their individual characteristics. The disability trait overshadows and qualifies all other traits and abilities...Very seldom will he be evaluated objectively on the basis of his knowledge, abilities, skills, strengths, and weaknesses." (Safilios-Rothschild at 111).

8. Perr, "Epilepsy and the Law", 7 Clev. - Mar. L. R. 280, 290 (1958).

9. Burgdorf and Burgdorf, Jr., "A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause", 15 Santa Clara Lawyer 855, 861 (1975).

10. Ibid., p. 863.

11. Ibid., p. 863.

12. In re Kileen, 121 Misc. 482, 201 N.Y.S. 209 (1923).

appearance in public places by any person who is "diseased, maimed, mutilated, or in any way deformed so as to be an unsightly or disgusting object."[13] Further, in a 1972 rule promulgated by the Air Traffic Conference it was stated:

> "...persons with malodorous conditions, gross disfigurement or other unpleasant characteristics so unusual to offend fellow passengers should not be transported by members."[14]

Under the guise of civilized humanitarian efforts, American society has developed a record, with respect to treatment of disabled persons, that is a history of stigma, isolation and discrimination inflicted upon them because of their handicaps.[15] This history, manifested

13. Comment, "Historical Overview: From Charity to Rights", 50 Temple Law Quarterly 953, 957 (1977).

See, e.g. Chicago, Ill., Mun. Code §36-34 (1966) - Repealed in 1974.

14. Air Traffic Conference of America, Trade Practices Manual, quoted in 118 Cong. Rec. 11363 (1972).

in the attitude of "out of sight - out of mind", carried out through policies of custodialism, has resulted in an ostracized, invisible minority denied access to the social mainstream, a separate class provided with separate facilities and encouraged to interact only with others of the same class.

This segregation is a product of centuries of discrimination against millions of Americans who happen to be disabled. Disabled people, simply because of their disabilities, have been shunned, ignored, stereotyped and placed in institutions and forced to lead confined, restricted lives. They have been denied basic personal liberties: the right to not be unjustly

15. Wright at 14-15. See Hull, "Foreword - The Specter of Equality: Reflections on the Civil Rights of Physically Handicapped Persons" 50 Temple Law Quarterly 944, at 951 (1977).

confined,[16] the right to be abroad in the land and participate in our society.[17]

Through the history of misconceptions, fears and stereotypes, a public policy of segregation has developed. Attitudinal barriers have caused the disabled minority to be excluded from the policy-making process and forgotten. We have, consequently, designed a nation for the average, "normal", able-bodied majority, little realizing that invisible millions cannot enter our buildings, ride our subways and buses, enjoy our educa-

16. tenBroek at 848. See also, O'Connor v. Donaldson, 422 U.S. 563 (1974).

17. See also, Comment, "Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled", 61 Georgetown L. J. 1501 (1973).

Achtenberg, "Law and the Physically Disabled: An update with Constitutional Implications", of Southwestern Univerity Law Review 847, 887 (1976).

tenBroek, "The Right to Live in the World: The Disabled and the Law of Torts", 54 Cal. L. R. 841, 848 (1966); (hereinafter cited as tenBroek-Torts).

tional and recreation programs and facilities, and use our communication systems.[18]

It is important to emphasize that physical, communication, and policy and practice barriers are secondary to the underlying attitudinal barriers in creating segregation of disabled individuals.[19] While the treatment of disabled persons as people with full rights in the planning and design of our

18. Bowe, "Handicapping America: Barriers to People", viii (1978) (hereinafter cited as Bowe).

19. It is important to distinguish between the terms disability and handicap. "A disability is a condition of impairment, physical or mental, having an objective aspect that can usually be described by a physician. A handicap is the cumulative result of the obstacles which the disability interposes between the individual and his functioning in society. A disability is, then, more particularly a medical condition, whereas a handicap more nearly refers to a "cultural definition imposed upon the disabled by their estate." (tenBroek and Matson at 814). Ideally the two concepts should correspond, however, "the psychological and socio-economic handicap suffered by disabled persons far outweighs the actual physical restrictions resulting from the impairment." (tenBroek and Matson at 814). See also, Wright and Safilios-Rothschild.

society may appear as simple as ramping a flight of stairs and providing readers and interpreters, negative attitudes about disability and disabled people make the issue far from simple.

These attitudes result in a profound misunderstanding of the class of people and their interest in the issue at hand. Disabled people want and expect to achieve the right to equal opportunity--the right to equal access to the rewards and responsibilities of our society.[20] That is the real issue. Society must realize the attitudes of fear and pity of disabled people are unfounded and the resulting public policies are unjust.

20. See generally, tenBroek-Torts; Wright; Goffman, "Stigma: Notes on the Management of Spoiled Identity" (1963) and "Deinstitutionalization: Program Policy and Development", Paul, Stedman and Neufeld, editors (1977); Safilios-Rothschild, "The Sociology and Social Psychology of Disability and Rehabilitation, (1970).

2. ENLIGHTENED PUBLIC POLICY, AS DEVELOPED BY THE COURTS AND LEGISLATURES, IS RAPIDLY EVOLVING TO REFLECT AND FOSTER CHANGING SOCIETAL ATTITUDES AND BELIEFS ABOUT THE CAPACITIES, ABILITIES AND RIGHTS OF DISABLED PEOPLE.

In the past few decades, more enlightened attitudes toward the disabled, and the appearance of many groups of disabled persons working toward social change, have brought about changes in public policy. This is evidenced in legislation, in judicial decisions, and in social changes.

As early as 1918 in some states, and 1920 in Congress,[21] Vocational Rehabilitation legislation was passed. This legislation was different from protective legislation

21. See tenBroek-Torts at 843.

in that its purpose was to provide the vocational training disabled persons needed to become self-sufficient. Underlying this legislation was the idea that disabled persons could be self-sufficient and productive members of society. At present, all states have Vocational Rehabilitation statutes.

In addition, nearly all states have enacted architectural barrier statutes which ban architectural barriers on new construction.[22]

Further, most states have enacted statutes prohibiting discrimination against the disabled in employment[23]. Again, some states have limited this to public employment, while others have banned discrimination by both the public and private sectors.[24]

22. Nicolai and Ricii, Access to Buildings and Equal Employment Opportunity for the Disabled: Survey of State Statutes, 50 Temple Law Quarterly 1067, at 1069.

23. Ibid., at 1080.

Recent judicial decisions have also shown a trend toward a more enlightened attitude toward disabled persons. For example, in Gurmankin v. Costanza,[25] an appellate court held that a school district's policy of refusing to employ disabled persons as teachers was a violation of their due process rights in that it raised an irrebuttable presumption that disabled persons could not teach. Mills v. Board of Education of the District of Columbia[26] cites that all disabled children were entitled to a free, public education, regardless of the nature or severity of their disability.

Further evidence of social change can be seen all around us. Many cities have begun to install curb ramps at street corners, thus making it possible for persons

24. Ibid., at 1081.

25. 556 F. 2d 184 (1977).

26. 348 F. Supp 866 (D.D.C. 1972).

in wheelchairs to move about freely on city streets. Some public television programs are now presented with captions for the hearing-impaired, and next year two major television networks will be offering a special service in which all of their television programs will be captioned.[27]

However, encouraging as these new attitudes are, they are merely drops in the bucket considering the centuries of discrimination that must be counteracted. State laws are woefully under-enforced,[28] and until recently there has been no strong federal legislation protecting the disabled.

27. Article, San Francisco Chronicle, March 24, 1979.

28. Achtenberg, Law and the Physically Disabled: An Update with Constitutional Implications, 8 Southwestern University Law Review 847, at 855 (1976).

3. REFLECTING THE CHANGING PUBLIC POLICY, SECTION 504 OF THE REHABILITATION ACT OF 1973 WAS ENACTED BY CONGRESS AS A CIVIL RIGHTS ACT TO PROHIBIT DISCRIMINATION ON THE BASIS OF HANDICAP BY RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE AND TO ENSURE EQUALITY OF OPPORTUNITY FOR DISABLED PERSONS.

In 1973, Congress enacted Section 504 of the Rehabilitation Act.[29] Section 504 is the first federal civil rights law to protect the rights of the disabled, and its passage of the act confirms the fact that Congress also perceived a need to end widespread discrimination against the disabled.

Speaking in Congress about the need for

29. 29 U.S.C. 794.

federal legislation to protect the rights of the disabled, prior to the passage of 504, Senator Humphrey commented that the purpose of such legislation was to respond to:

> "an awakening public interest in millions of handicapped children, youth, and adults who suffer the profound indignity and despair of isolation, discrimination, and maltreatment. It is essential that the right of these forgotten Americans to equal protection under the laws be effectively enforced through prohibiting their exclusion from services receiving Federal assistance."[30]

Late that year, Senator Humphrey commented,

> "The time has come to firmly establish the right of these Americans to dignity and self-respect as equal and contributing members of society, and to end the virtual isolation of millions of children and adults from society."[31]

30. Cong. Rec. - Senate. p. 9495, March 22, 1972.

31. Cong. Rec. - Senate. p. 32310, September 26, 1972.

The passage of Section 504 clearly shows that Congress felt a commitment to end discrimination on the basis of handicap and to bring disabled Americans into the mainstream of society.

B. SECTION 504 MUST BE INTERPRETED TO IMPOSE UPON RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE AN AFFIRMATIVE OBLIGATION TO MAKE ACCOMMODATIONS TO A PERSON'S HANDICAP IF THE LAW IS TO ENSURE MEANINGFUL EQUALITY OF OPPORTUNITY FOR DISABLED PEOPLE.

The language of Section 504 is meaningless if it is interpreted to require only passive non-discrimination against the disabled. Despite recent changes in public policy which have encouraged disabled persons to enter into the mainstream of society,

they will continue to be excluded, unless the architectural, communication, and attitudinal barriers which have confronted disabled persons for so long are removed.

The Department of Health, Education and Welfare, in enacting its 504 regulations, correctly perceived the necessity for interpreting the law so that it would do more than just passively bar discrimination -

> "There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction."[32]

In its regulations, HEW implemented the clear mandate of the law--ending discrimination against the disabled--in the only way it is possible to do so--by imposing an affirmative duty[33] to remove the architectural and communication barriers that prevent disabled persons from fully participating in society.

As we have shown, disabled persons have long been a forgotten minority. They were overlooked and ignored when our transportation systems, buildings, and educational and recreation facilities were designed.

32. Introduction to HEW 504 regulations 42 F R 22676, May 4, 1977.

33. "Affirmative duty" should not be confused with "affirmative action". "Affirmative action" has a special meaning in the context of employment which we do not wish to imply here. By "affirmative duty" we mean a positive obligation to make changes, as opposed to a mere passive duty not to purposely exclude.

Even though the failure to plan for the disabled may not have been through a desire to intentionally exclude them, they have been excluded nonetheless. If we are to rectify this exclusion and segregation, we must also rectify the conditions--the architectural and communications barriers--that perpetuate this exclusion. A law that purports to end discrimination against the disabled, but that does nothing to remove the already existing barriers that foster this discrimination is meaningless.[34]

For many disabled persons, equal opportunity will only be affected through unequal

34. In Lloyd v. Regional Transit Authority, 548 F. 2d 1277 (1977) (U.S.C.A., 7th Cir.) a case which held that section does impose an affirmative duty on recipients, the court commented, "Under these (federal) standards there is no equality of treatment merely by providing (the handicapped) with the same facilities (as ambulatory persons) * * *; for (handicapped persons) who (can) not (gain access to such facilities) are effectively foreclosed)." paraphrased from Lau v. Nichols 414 U.S. at 566, 94 S.Ct. at 788.

treatment.[35] A civil rights statute that bars discrimination against disabled persons, but that merely requires they be accorded the same treatment and be allowed to use the same facilities as other persons, leads one to the untenable result reached by the court in Snowden v. Birmingham.[36] In that case, the court held that a transportation system inaccessible to disabled persons was not discriminatory, since any disabled person who could somehow get on board was still permitted to do so.[37]

That case, and any such interpretation of a civil rights law protecting the disabled represents a profound misunderstanding of

35. This is acknowledged in HEW's May 17, 1976 policy statement interpreting Section 504: "Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." 41 F. R. 20296 (May 17, 1976).

36. 407 F. Supp. 394 (D.C. Alabama 1975).

the issue,[38] and treats disabled persons like second-class citizens who are not entitled to the full range of freedoms enjoyed by other persons.[39]

The court must be aware that in some ways the disabled differ from other minorities in that they have special needs that can never be accommodated through mere facially neutral policies.[40] However, like other minorities, the disabled have a right to be fully integrated into society. The fact that

37. The court commented, "Persons confined to wheelchairs are permitted to ride as passengers on BJCTA vehicles. Although it is necessary for persons handicapped in this manner to arrange for someone to help them board and alight from the bus, these persons are allowed to use the transportation vehicles in question. Thus, it cannot be said that persons who ambulate by wheelchair are excluded from using the defendant's transportation system."

38. See Hull, Kent, "Foreword - The Specter of Equality: Reflections on the Civil Rights of Physically Handicapped Persons". 50 Temple Law Quareterly 944, at 951 (1977).

39. See tenBroek-Torts, sup. a. 54 California Law Review at 851.

this right can only be realized through special accommodations is not a valid or acceptable reason for relegating disabled persons to a life of segregation.[41]

40. The Court has already held that, at times, a minority group must be accorded special treatment in order for its rights to be fully realized. See Lau v. Nichols 414 v.s. 563, 94 S.Ct. 786, 39 L. Ed. 2d 1. There the Court held that a school district was required to give special instruction to Chinese-speaking students if their right to an education was not to be abridged.

41. It must be clarified that this case does not involve issues of "reasonable accommodation" and "undue hardship". (45CFR84.12). This is a case involving denial of access to educational programs, not employment; economic cost is not a factor. "Economic cost has not been a factor in civil rights since the Emancipation Proclamation." - Gary Gill, CIL/DLRC Albuquerque, New Mexico 504 Training, March 16, 1979; DHEW Secretary Joseph Califano, Jr. stated in his background discussion to the HEW regulations stated: "These problems have been compounded by the fact that ending discriminatory practices involve major burdens on some recipients. These burdens and costs, to be sure, provide no basis for exemption from Section 504 or this regulation Congress' mandate to end discrimination is clear." 42 F. R. 22676, May 4, 1977.

Many commentators cite an economic study by Dave M. O'Neill ("DISCRIMINATION AGAINST HANDICAPPED PERSONS: The Costs, Benefits and Economic Impact of Implementing Section 504..." prepared for the Office for Civil Rights (HEW) under orders #SA-4141-76 and #SA-2471-71), that the annual costs will be "about $3.2 billion" (at 65). They do not, however, include the rest of O'Neill's conclusion. It is clear the real cost to society in this study is estimated to be "...a pecuniary cost deficit of only $.3 billion per year to be balanced against psychic benefits." O'Neill concludes "...that in the aggregate the benefits forthcoming (psychic as well as pecuniary) provide a substantial offset to the costs to be incurred (at 3).

II. IN THE INSTANT CASE, SECTION 504 REQUIRES SOUTHEASTERN COMMUNITY COLLEGE, AS A RECIPIENT OF FEDERAL FINANCIAL ASSISTANCE, TO TAKE AFFIRMATIVE STEPS TO ACCOMMODATE TO FRANCES DAVIS' HANDICAP IN PROVIDING HER WITH AN EDUCATION.

A. THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE REGULATIONS IMPLEMENTING SECTION 504 WITH

RESPECT TO POST-SECONDARY AND VOCATIONAL EDUCATION INSTITUTIONS IS CORRECT AND FOLLOWS THE INTENT AND THE SPIRIT OF A CIVIL RIGHTS LAW MEANT TO END DISCRIMINATION ON THE BASIS OF HANDICAP BY MANDATING THAT A RECIPIENT TAKE AFFIRMATIVE STEPS TO ACCOMMODATE TO THE NEEDS OF A QUALIFIED HANDICAPPED PERSON.

The issue of an obligation to take affirmative steps to accommodate to a qualified handicapped persons arises in two general contexts in provision of post-secondary and vocational education services: (1) in recruitment and admission, and (2) in treatment after admissions.[42]

42. Subpart E - Postsecondary Education, 45 CFR 84.41-84.50. Subpart A - General Provisions, Subpart B - Employment Practices, Subpart C - Program Accessiblity , and Subpart G - Procedures, also apply to post-secondary and vocational institutions (42 CFR 84.1 et seq) and each subpart includes affirmative obligations imposed upon recipients.

First, to ensure the opportunity for full participation of qualified[43] handicapped persons, a recipient's recruitment and admissions policies, practices, and procedures must be free of discrimination. Thus, a post-secondary or vocational education institution may not refuse to admit a person solely on the basis of the person's handicap, if the individual meets the academic and technical standards required for admission or participation in the program or activity (i.e. if the person is qualified).[44] The section-by-section analysis of the 504 regulation, by the Department of Health, Education and Welfare (DHEW) explains that:

> "both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all non-academic admissions criteria that are essential to participation in the program in question."[45]

43. "Qualified" and "Otherwise qualified" are construed to be synonymous terms by HEW. 42 F. R. 22686 (May 4, 1977).

44. 45 CFR 84.3 (k) (3).

These provisions prohibit recipients from making admissions decisions that are based on false stereotypes or presumptions about the capability of a disabled person or class of disabled persons. Each person must be evaluated individually and to ensure a qualified handicapped individual is not denied an equal opportunity for admission the DHEW Regulations require, where necessary, that a recipient take positive steps to accommodate by modification of admission requirements to academic programs.[46]

It may not be sufficient merely to modify academic requirements after admission--it may be necessary to make the modifica-

45. 42 F.R. 22687 (May 4, 1977).

46. 45 CFR 84.44(a).

tion in order for the person to be admitted.[47] Thus, while a recipient shall not be required to modify or substitute for essential requirements, a recipient must modify or substitute for those requirements that "discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant..." [48]

Second, upon admission to a post-secondary or vocational education institution, a qualified handicapped student may require modifications, accommodations, adaptation or aids in order to effectively participate in the program. A recipient must modify those non-essential academic requirements that discriminate or have the effect of discriminating. The section-by-section

47. 45 CFR 84.44(a) lists some examples of types of accommodations a recipient may be required to institute for an individual qualified handicapped student.

48. 45 CFR 84.44(a).

analysis by DHEW states, that while a recipient may not be required to waive course or other academic requirements, a recipient

> "must accommodate those requirements to the needs of individual handicapped students."
>
> "...it should be stressed that academic requirements that can be demonstrated by the recipient to be essential...need not be changed." [49]

It is clear that the language of the regulations is affirmative--

> "A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary..." [50]

Therefore, the burden is on the recipient to take action to adapt or accommodate to the special needs of a qualified handicapped person.

49. 42 F. R. 22692 (May 4, 1977).

50. Ibid.

B. THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS ANALYSIS AND APPLICATION OF SECTION 504 AND THE DHEW REGULATIONS IS CORRECT IN THE INSTANT CASE.

The Fourth Circuit Court of Appeals concluded that the District Court

> "erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was 'otherwise qualified' for admittance to the program,..., rather than focusing upon her academic and technical qualifications..."[51]

Thus, the Court held

> "...that the college must reconsider plaintiff's application for admission to the nursing program without regard to her hearing disability."[52]

Further, the Court concluded

51. Davis v. Southeastern Community College 574 F. 2d 1158, 1161 (1978).

52. Ibid., at 1160.

> "...precedent likewise supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive."[53]

The Court recognized that a requirement that educational institutions must take positive steps to accommodate to the needs of a qualified handicapped person is not unreasonable, rather it is necessary in light of the long-perpetuated error of constructing and establishing a society and institutions that do not permit access and participation by disabled persons.

The Fourth Circuit Court of Appeals Analysis follows the mandate of America's colleges and universities stated by the American Council on Education in outlining "A Higher Education Agenda for the 96th Congress":

53. Ibid., at 1162.

> "America's colleges and universities serve as a vital instrument of national progress. The expansion of opportunities for all citizens, the future growth and stability of the economy, and the achievement of broad societal goals are significantly dependent on the capacity of the higher education community to meet the educational and training needs of a diverse population, to advance the frontiers of knowledge and research, and to encourage their practical application." [54]

To make this agenda a reality - to overcome the centuries of discrimination and segregation against disabled people - the Court of Appeals analysis and application of Section 504 and DHEW regulations must be upheld.

54. Saunders, Jr., "Governmental Relations: A Higher Education Agenda for the 96th Congress", 60 Educational Record 103 (1979). The American Council on Education is a comprehensive organization representing the entire community of higher education to Congress.

CONCLUSION

In this case, the Court is presented for the first time with a case raising major policy issues involving the civil rights of disabled people. The Amici Curiae respectively submit to the Court that equal opportunity under Section 504 requires, as implemented in the DHEW Regulations, that recipients be placed under a mandate to take positive steps to accommodate and adapt their programs, services and benefits to the needs of qualified handicapped persons.

It cannot be denied that disabled people have been discriminated against and segregated from the social mainstream. No one will argue that perpetuation of such actions by society is unjust; and no one can quarrel with the goal of full access and participation by disabled persons in society.

Section 504 is the major civil rights

legislation enacted to make such equal access and equal opportunity a reality. To ensure the Congressional mandate of non-discrimination against disabled persons is meaningful--to ensure meaningful equal access and equal opportunity--it is imperative that the Court recognize the barriers presented by societal attitudes, as well as, the physical and related barriers.

The Amici Curiae submit that it is not merely economic/physical barriers society must overcome--but attitudinal barriers that devalue the abilities and desires of people with disabilities. We urge the Court to uphold the court of appeals.

Respectfully submitted,

ROBERT J. FUNK

SUSAN B. SCHAPIRO

PAUL A. SILVER

Disability Law Resource Center
Center for Independent Living
2539 Telegraph Avenue
Berkeley, California 94704
(415) 548-4274
Attorneys for Amici Curiae

ANN FAGAN GINGER

1715 Francisco Street
Berkeley, California 94703
(415) 848-0599
Of Counsel